United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

Court of Appeals, District of Columbia

No. 2241.

790

DORA F. ROBINSON, *et al.*, *Appellants*,

vs.

MYRA T. HILLMAN, *et al.*

BRIEF ON BEHALF OF APPELLANTS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT OF CASE.

In the Supreme Court of the District of Columbia the appellees, hereinafter designated as the plaintiffs, sued the appellants, hereinafter designated as the defendants, in an action of ejectment. Issue was joined upon the plea of not guilty. At the trial the Court, upon all the evidence, directed the jury to return a verdict for the plaintiffs, which was done, and from the judgment entered thereon the defendants have duly prosecuted this appeal.

The questions now involved were duly reserved by the defendants in a bill of exceptions, which is part of the printed record, and which contains all the evidence at the trial. It contains four exceptions: 1st, to the admission of certain documents in evidence (Rec., pp. 4-8); 2d and 3d, to the exclusion of evidence (Rec., p. 12); 4th, to the action of the Court in directing the jury to return a verdict for the plaintiffs (Rec., pp. 12, 13).

1. The undisputed facts in evidence are as follows: The parcel of real estate comprising all of Lots 12 and 13 in Reservation 11, in the City of Washington, District of Columbia, and mentioned in plaintiffs' declaration, was rectangular in shape, 50 feet wide from north to south and 150 feet in depth from west to east, bounded on the west by Third Street, Northwest; on the north by a 14-foot public alley, and on the east by a 35-foot public alley, of which parcel Lot 13 constituted the northern half and said Lot 12 constituted the southern half. The west 100 feet of said parcel was divided by lines running from west to east into three sub-parcels, each 16 feet, 8 inches, in width, and numbered, respectively, from south to north, 225, 227 and 229, and each being improved by a dwelling house fronting on Third Street, at the rear of which on said sub-parcels are wood sheds. In 1869, Seth Hillman, his wife, Ann B. Hillman, and her daughters, the plaintiffs, resided in the middle house, the said No. 227. He resided there until his death in 1881; the said Ann B. Hillman resided there until her death in November, 1902; and the plaintiffs still continue to reside there.

By deed dated December 30, 1898, the defendant, Mrs. Dora F. Robinson, became the owner, in fee simple, of the east 50 feet of said original parcel, which, by subdivision, duly recorded August 28, 1908, she combined into Lot 36 (See diagram, Rec., p. 10). On this Lot 36 she then

erected a four-story brick building 60 feet in height, in accordance with a building permit duly issued to her upon her application therefor and in accordance with the building regulations of the District. Her husband, the defendant, Dr. C. B. Robinson, acted as her foreman in charge of this work. The west wall of this building is 18 inches in thickness at the base (Rec., p. 8), and its center is on the division line between said Lot 36 and the west 100 feet of said original parcel (Rec., p. 11). One-half (9 inches) of the wall is upon said Lot 36, and the other one-half is upon said west 100 feet. It was referred to as a "party wall" in the building permit and officially located as such by the Surveyor of the District during its construction, and was dealt with as such by the building department of the District under the building regulations, and was constructed as such (Rec., pp. 11, 12). Its construction began August 14, 1908 (Rec., p. 12), and on November 19, 1908, when this suit was instituted, said wall was entirely built and the roof was on the building. The building is known as Robinson Hall, and now (at the time of the trial) it is occupied by the United States College of Veterinary Surgeons as tenants of said Dora F. Robinson (Rec., p. 12).

Between the said west wall and the wood sheds before mentioned is a space referred to as a passageway, 4 feet wide, which was left for the exit of people from the rear of the Third Street houses, Nos. 225, 227 and 229, to the 14-foot alley (Rec., p. 8), but the evidence does not show whether it was a temporary or permanent way, or by whom or when it was created, or whether or not the people in the Third Street houses or any other people ever made such or any use of such space, as a passageway or otherwise.

The plaintiffs (Rec., pp. 4-8), over the objection of the defendants and subject to exception then duly noted, gave in evidence certain written instruments purporting to show

that in July, 1822, at a public sale by the Commissioners of the Low Grounds, said Lots 12 and 13 were sold, upon certain terms and conditions therein stated, to Robert Keyworth, and that he, by deed dated October 19, 1830, conveyed said Lot 12 to Hugh Gelston in fee, and on October 26, 1835, assigned all his interest in said Lot 13 to said Gelston; that by lease, dated July 20, 1868, the said Gelston demised to Edward Wools the western 100 feet of said parcel for a term of 99 years with covenant for renewal of said lease forever, reserving a specified rental, and dividing the demised property into three sub-lots, each 16 feet, 8 inches, in width, and 100 feet in depth; that September 27, 1869, the said Wools assigned his leasehold interest in the middle of said sub-lots to Seth Hillman, who assigned the same, July 21, 1870, to Lizzie Clements, who assigned the same, August 15, 1870, to Ann B. Hillman, who by her last will and testament, dated June 27, 1899, bequeathed the same to her executrices, her daughters, Elizabeth Clement and Myra T. Hillman, in trust to sell the same and out of the proceeds to pay certain legacies or, in the alternative, if her said daughters elect to pay said legacies out of their private funds, then to sell and convey the same and divide the proceeds equally between themselves.

Next, the plaintiffs gave evidence tending to prove that said legacies were paid by the plaintiff, Elizabeth Clement, out of her private funds.

The defendants gave in evidence Sections 1, 28, 55, 62, 63 and 74, of the Building Regulations of the District of Columbia, in force ever since July, 1908, relating to party walls (Rec., pp. 9-11); also that the following notice in writing was duly served by the defendants on the plaintiffs and filed in this suit March 22, 1910, viz.:

"The plaintiffs will take notice that if the verdict of the jury at the trial in the above-entitled suit shall be in favor of the title of the plaintiffs the defendants and each of them will claim the benefit of permanent improvements that have been placed on the property by the defendants or either of them."

Thereupon the defendants duly offered evidence of the value of that portion of said west wall, 9 inches in width and 16 feet and 8 inches in length, at the rear of plaintiffs' premises and outside of said Lot 36, being the only portion of said wall which rests upon the *locus in quo,* but the Court excluded the same, to which ruling the defendants duly excepted (Rec., p. 12).

No more evidence was offered.

Assignment of Errors.

The Court erred as follows:

1. In excluding the testimony offered by the defendants to prove the value of that portion of said west wall extending 9 inches over and upon the *locus in quo* (Rec., p. 12).

2. In admitting in evidence the written instruments offered by the plaintiffs (Rec., pp. 4-8).

3. In directing the jury, upon the whole case, to return a verdict for the plaintiffs for the *locus in quo* as described in the declaration (Rec., pp. 12, 13).

4. In holding that the plaintiffs were entitled to recover in their individual capacity.

5. In holding that, as matter of law, the wall in question was not a party wall.

Points and Authorities.

I.

First Assignment of Error.

The second exception, as to the cost of the construction of the entire building, is waived, but the third exception as to the cost of that portion of the wall which rests upon the *locus in quo* should be sustained (Rec., p. 12). The notice was given and this proof was offered under Secs. 1003-1010, Code, D. C.

It is conclusively established by the evidence that the wall was constructed in good faith as a party wall by the owner of Lot 36, and that the plaintiffs, living within 100 feet from the wall, never objected to the work during its progress; that whoever has the right to build on or to occupy the *locus in quo* may utilize the wall as a party wall; that its location was fixed by actual survey by the District Surveyor whose certificate thereof is conclusive (Code, D. C., Sec. 1589); that all the requirements of Sec. 1003, under which the notice was given, had been complied with.

If in any view of the case the plaintiffs could be entitled to a verdict, it would be subject to said Secs. 1003-1010 of the Code, and the exclusion of the proof of the cost of that portion of the wall which rests upon the *locus in quo* was prejudicial to the defendants, and erroneous.

II.

The second, third, fourth and fifth assignments of error may be considered together.

Upon the whole case the defendants, and not the plaintiffs, were entitled to a verdict, because:

(1) There is no evidence of any act by the defendants or either of them adverse to the plaintiffs concerning the *locus in quo* or any part thereof.

(2) The evidence shows no such right or title in the plaintiffs as is required to maintain this action.

1. The *locus in quo* is a small strip of land adjoining Lot 36, of which Lot 36 Mrs. Robinson is sole owner in fee simple. To this strip the defendants are not claiming title and there is no evidence that they are in possession thereof in whole or in part. The only portion of the strip which appears by the evidence to be used or occupied by any one, for any purpose, is that portion covered by one-half of the width of an 18-inch party wall laid equally thereon and on Lot 36. The defendants in thus constructing said party wall did not take possession of that portion of the *locus in quo*. The possession thereof remains in the plaintiffs just as the possession of that portion of Lot 36 covered by the other half of the wall remains in Mrs. Robinson. The wall was "built upon the dividing line between adjoining premises for their common use," under Secs. 1 and 62 of the Building Regulations, D. C. (Rec., p. 9), and its erection as a party wall under the regulation approved by President Washington, October 17, 1791, was not dependent upon the consent of the adjoining owner or of the plaintiffs, who never had any standing in Court to object to its erection.

Hutchins vs. Munn, 22 App. D. C., 88, 99, 100.

It is clear, upon all the evidence that the adjoining owner, or whoever had a right to build upon the *locus in quo,* could utilize the wall as a party wall for a back building and that the defendants or any succeeding owner of Lot 36 could not prevent such use of it. Had there been any question as to whether or not it could be so utilized, it was a question of fact for the jury and not one of law for the Court to determine.

The regulation approved by President Washington in 1791, now part of Section 62 of the Building Regulations, is a rule of property in this city. It provides that the proper official, now the Building Inspector, "May enter upon the land of any person to set out the foundation and regulate the walls to be built between party and party, as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built." This regulation has the force of law.

Priest vs. Talbott, 16 App. D. C., 422, 424.
Hutchins vs. Munn, *supra.*

The terms of this regulation are mandatory. Under it, the foundation of a wall between party and party *shall* be laid equally upon their lands, and the officer charged with the duty of supervision, may enter the land of either of said parties in order to perform such duty. The terms of Sections 63 and 74 of the Building Regulations imply that one-half of a wall between parties may be laid on the land of the adjoining owner *without* his consent but not over 9 inches. These two sections in this respect are evidently based on the theory that the regulation of 1791, in Section 62, is a rule of property and that a wall may be laid as a party wall by one owner without the consent of the adjoining owner, provided only it come within the definition of a party wall, as stated in Section 1, as a wall "upon the dividing line between adjoining premises for their common use."

Hutchins vs. Munn, *supra.*

The plaintiffs themselves, if they have the rights claimed by them as to the premises No. 227, could have built just such a wall as a party wall in the precise location of the wall in question. There is nothing in the evidence tending

to prove that the defendants would have objected thereto or could have maintained such objection.

The construction of the wall with one-half of it, 9 inches, upon the land to which the plaintiffs claim right of possession, was not a wrongful entry into possession of that land, nor was it an exercise of an act of ownership over said land adverse to the plaintiffs; because that wall was built as a party wall for the common use of the parties on both sides. Therefore, upon all the evidence, under Section 1001, Code, D. C., the defendants were entitled to a verdict of not guilty.

2. The plaintiffs rely upon a mere possessory title to the *locus in quo,* and such title, upon the facts in evidence, is insufficient to support this action.

In Bradshaw vs. Ashley, 14 App. D. C., 485, 506, affirmed in 180 U. S., 59, 63, 64, 65, referring to the rule that proof of possession raises a presumption of title sufficient to make out a *prima facie* case for plaintiff, and to place the burden on the defendant to prove in himself a better title, the Court stated that:

> "The rule is intended to prevent and redress trespasses and wrongs, and it is limited to cases where the defendants are trespassers and wrongdoers; it is therefore qualified in its application by the circumstances which constitute the origin of the adverse possession, and it does not extend to cases where the defendant has acquired possession peaceably and in good faith, under color of title."

In the case at bar it appears by the uncontradicted evidence that while the plaintiffs were in possession of the *locus in quo,* under a lease from Gelston, who never had acquired the legal title to the land, Mrs. Robinson, the owner in fee simple of Lot 36, built upon the dividing line between her premises and the adjoining premises, *i. e.,* the *locus in quo,* a wall, 18 inches in widfh; that said wall was laid equally

upon Lot 36 and upon the *locus in quo* constituting the adjoining premises, that is to say, 9 inches upon each; that the breadth or thickness, *i. e.*, the width of this wall, while mentioned in the official building permit as 17 inches (Rec., 11) was required by Section 55 of the Building Regulations (Rec., 9) to be 18 inches at the foundation and to and including the second story; that said wall was built as, and for the purposes of, a party wall strictly in accordance with the law and regulations having the force of law concerning party walls; that during the three months commencing August 14th (Rec., 12) and ending November 19 (Rec., 8), while the wall was being built, the plaintiffs, living within 100 feet from the work and having full knowledge of the facts, made no objection to the acts of the defendants in so constructing the wall.

Can the plaintiffs now claim, under such circumstances, that the defendants are trespassers or wrongdoers?

If such placing of one-half of the wall on the *locus in quo* was an entry or taking of possession, was it not done peaceably and under color of right?

If there be any lack of good faith in the matter should it be charged against the defendants, who proceeded peaceably and openly and in accordance with the law and a well established rule of property, or against the plaintiffs who stood by and watched the defendants for three months engaged in the construction of the wall and uttered no word of objection thereto until the completion of the work? Was it not the duty of the plaintiffs to speak sooner if they had any ground of objection to such placing of the wall and are they not now estopped, by reason of their silence, from now complaining?

The defendants do not claim title to the *locus in quo* or any part thereof; they are not trespassers thereon but built the wall peaceably, in good faith and with the acquiescence,

implied by the silence of the defendants. The plaintiffs, therefore, cannot maintain this action upon a mere possessory title, but it was incumbent upon them under the general issue to show a complete chain of title from the sovereign.

Bursey vs. Lyon, 30 App. D. C., 597.

In ejectment the plaintiff must rely upon the strength of his own title and must show in himself a legal title. The only exception as to the requirement of a legal title is that specified in Section 989 of the Code D. C., which is inapplicable to this case.

In this case, the plaintiffs assumed the title to be first in the Commissioners of the Law Grounds without showing how the title got into the commissioners or that it ever passed from them. The certificates of sales to Keyworth (Rec., 4) were incompetent to show acquisition of title by him. They do not purport to convey the property or to vest in Keyworth any title thereto. The Act of Congress authorizing such sales by the Commissioners provides:

> "Sec. 3. And be it further enacted, That, upon the payment of the purchase money, and upon the compliance with the conditions of improvement by the purchaser or purchasers, or his or their heirs or assigns, the mayor of the said city, for the time being, shall be, and he is hereby, empowered to execute a deed or deeds in fee to such purchaser or purchasers, his or their heirs or assigns, under his hand and the seal of the said corporation; which deed or deeds shall be recorded among the land records of the county of Washington, within the time prescribed for the recording of conveyances of real estates."
>
> Act of May 7, 1822, Chap. 96, 3 S. L., 691, 692.

By the express terms of the Act no conveyance of the title could be made to Keyworth until after his performance

of the conditions referred to in the Act and specified in the certificates. There is no evidence of such performance and it therefore appears that he never received even the equitable title and that he, himself, if living today, could not maintain this suit.

3. Plaintiffs claim title in their own right as tenants for a term of years. The interest they allege is a chattel interest under the statute law of this District. Leases for years "shall be considered assets to be administered by an executor or administrator." Code D. C., Sec. 317. If they have any such interest it is vested in them as executrices of the will of their mother, Ann B. Hillman (Rec., 6, 7) in trust, not merely to secure payment of legacies, but to sell and convey in any event and this trust is not discharged without such sale and conveyance.

Smith vs. Wilson, 17 Md., 460.
Merryman vs. Long, 29 Md., 540.
Foss vs. Scarff, 55 Md., 301.
Wilkes vs. Wilkes, 18 App. D.C. 90.

4. If the plaintiffs have any cause of action it is by an action for a nuisance and not in ejectment. That seems to be the view of this Court in the case of an overhanging structure.

Frizzell vs. Murphy, 19 App. D. C., 440.

In that case, in ejectment, the Court (at p. 445) quoted from 7 Enc. Pl. & Prac., 274, as follows:

> "The cases are not altogether harmonious as to whether or not the action will lie against the owner of an overhanging roof, or a projecting cornice, but the weight of authority is, we think, that the action in such case cannot be maintained. The reason would seem to be that the sheriff cannot deliver possession, and the proper remedy is by an action for a nuisance."

The writer thus quoted by this Court also says:

> "It is sometimes said that party walls are incorporeal hereditaments, mere easements, and that ejectment will not lie therefor, nor for the land on which they stand."
> 7 Enc. Pl. & Pr., 277.

The difficulty of delivering possession of a 9-inch strip of land lying under a wall 60 feet in height would seem to be even greater than if the same strip of land were merely under a projecting cornice or other portion of a structure not resting upon the land.

III.

If it were not for the jealousy with which the law guards the rights of land owners, this case would come within the principle, *de minimus non curat lex*. It is certainly a case in which the plaintiffs seek to overturn the party wall regulation of 1791 and to ignore the decision of this Court in Hutchins vs. Munn, *supra*.

From every point of view, upon all the evidence, the judgment should be reversed.

Respectfully submitted,

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Court of Appeals, District of Columbia.

JANUARY TERM, 1911.

No. 2241.

DORA F. ROBINSON, C. BARNWELL ROBINSON,
APPELLANTS,

vs.

MYRA T. HILLMAN, ELIZABETH CLEMENT,
APPELLEES.

BRIEF FOR APPELLEES.

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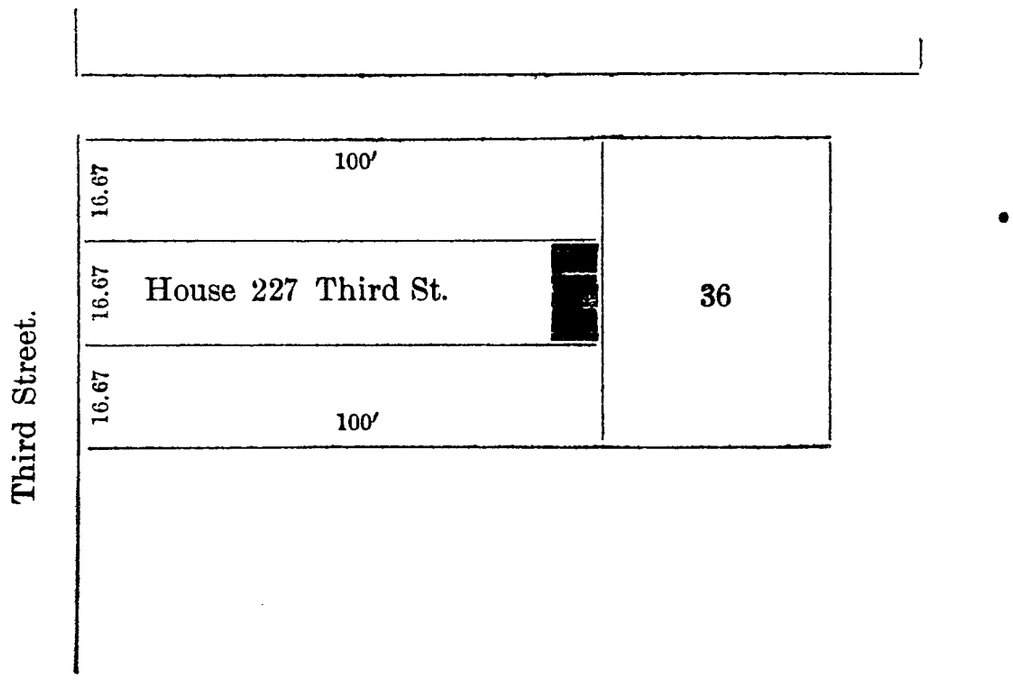
BRIEF FOR APPELLEES.

Statement of Case.

This appeal involves a part of the same controversy that was under consideration by this court in No. 2202, October term, 1910, between the same parties, decided January 3, 1911, and some of the issues are the same. There the defendants, appellants in this court, claiming title to lot 36 shown on the plat below, which lot was subject to an easement in favor of the plaintiffs of a right of way over its west four feet (as was claimed by plaintiffs, appellees here, subject also to the easement of sewerage and drainage in favor of said plaintiffs), were sued by said plaintiffs for the destruction of said easements. At the trial below of that case it appeared that the defendants had constructed a building entirely covering lot 36 and obliterating the four feet

right of way, and had entered upon the property of the plaintiffs and established thereon another four feet right of way by cutting off the rear four feet of the sheds belonging to the plaintiffs and their neighbors, so that as a result of the unlawful acts of the defendants the plaintiffs were not only deprived of their easements over lot 36, but their own property as to the rear four feet thereof was subjected to an easement in favor of the defendants and the adjoining owners north and south of the plaintiffs. The jury found verdicts both for the destruction of the right of way and the destruction of the sewer and drain. This court affirmed the judgment as to the right of way, but disaffirmed as to the sewer and drain and the plaintiffs remitted in this court the verdict on that count.

This action was brought shortly after the foregoing to recover possession of a strip 4 feet 9 inches by 16 feet 8 inches embraced within the alley unlawfully created by the defendants over the property of the plaintiffs, as well as a strip nine inches wide, being the rear nine inches of the plaintiffs' property, upon which the defendants had constructed the west wall of their building; the shaded portion of the plat below shows the *locus in quo*.



The defendants did not disclaim as to any part of the *locus in quo,* but pleaded the general issue, and in the trial and argument of the cause below raised the same issues as to the plaintiffs' lack of title and estoppel by their conduct as had been raised by them and decided against them in the previous case; and now in this court, after the verdicts of two juries against them and one adverse decision of this court, the same issues as to title, etc., are being pressed for reconsideration; the only new question is whether or not *a wall on the back line of a lot already built upon, a wall not susceptible of any use whatsoever by the plaintiffs, can be construed to be a party wall,* and as such located partly upon the land of an adjoining owner. At the trial of this case below the plaintiffs, among other evidence, gave evidence tending to show that at and prior to 1868 Hugh Gelston claimed title to all of the property shown on the above plat, and in 1868 leased the three lots on Third Street to Edward Wools for 99 years, renewable forever; that Edward Wools assigned the middle lot, including the *locus in quo,* to Seth Hillman in 1869; that the title acquired by Hillman became vested by mesne conveyances and wills in the plaintiffs, and that Hillman and those claiming under him, including the plaintiffs, have resided continuously upon the property ever since 1869 as tenants under said lease (R., pp. 6, 7, 8); that said three lots on Third Street are improved by three houses having rear yards and woodsheds on the rear line; that the defendant C. Barnwell Robinson, acting as foreman for his wife, Dora F. Robinson, built a wall nine inches over on the *locus in quo,* and established a passageway four feet wide extending over the *locus in quo* between the wall and the woodsheds (R., p. 8).

The defendants offered evidence tending to show that Dora F. Robinson was the owner at the time action brought of lot 36, the title to which was derived from Hugh Gelston (R., p. 8), but no evidence was offered to establish in the defendants any title or color of title or claim to the *locus in quo.*

None of the facts in the case were disputed, the defendants relying upon the provisions of the party wall regulations as an excuse for the unlawful entry, and upon the provisions of sections 1003 *et seq.* Code D. C., as giving them a right to recover from the plaintiffs the value of the wall as an improvement made in good faith upon the land of the plaintiffs. The court below held that the wall was not a party wall and that it was a detriment to the plaintiffs' property and not an improvement thereon, and directed a verdict for the plaintiffs.

POINTS AND AUTHORITIES.

Plaintiffs' Title Good by Possession.

The plaintiffs had been in peaceable possession of the *locus in quo*, under claim of title, for over forty years; the defendants claimed no title, and were mere trespassers.

> "In an action of ejectment, a plaintiff who has been peaceably in possession of real estate, under a claim of title, for a period of time even less than twenty years, when the possession has never been voluntarily abandoned or relinquished, is entitled to prevail against a mere trespasser who subsequently enters, but who shows no lawful right or title, or claim of title, in himself."
>
> Syl. Bradshaw *vs.* Ashley, 14 App. D. C., 485.

See also

Chesapeake Beach *vs.* Washington, 23 App. D. C., 587.

Plaintiffs and Defendants Claim under Common Source.

The theory of the defendants' right to be on the plaintiffs' land is predicated upon their having title to lot 36 adjoining; their title to lot 36 was derived from Hugh Gelston, a source common to both titles.

Morris *vs.* Wheat, 11 App. D. C., 201.
Reid *vs.* Anderson, 10 App. D. C., 426.

> "The general issue in ejectment puts in issue the right of possession to the whole premises declared for by plaintiff; and where it is the purpose of defendants to raise the question of the right of plaintiff as against the defendants to the possession of any particular portion of the premises declared for, it is incumbent upon them to narrow their defense accordingly."
>
> Crandall *vs.* Lynch, 20 App. D. C., 73.

The discharge of the legacies ordered paid to Ann Hillman's sons, by her will, vested the interest in the plaintiffs individually and not as executrices. The use of the words "my executrices hereinafter named" in clause 2 of the will is merely *descriptio personarum*. Where the trustees and beneficiaries are identical the trust is discharged. Even if the action should have been brought in their names as executrices, the defendants waived it by not pleading in abatement.

The appellants are estopped to deny the title of the appellees to the locus in quo by the doctrine of res judicata.

In order to make out their title to the easement in the previous case they had to prove title and right to possession of the *locus in quo* to which said easement was appurtenant;

that title was one of the issues in that case and the appellants are precluded by the judgment in that case.

> "If the two actions, although they may involve the right to different things, put in issue a common matter of fact as a necessary ground of recovery, its adjudication in the first suit is conclusive upon the second."
>
> Am. & Eng. Encyc. (2d ed.), vol. 24, p. 778, and cases cited, note 4.

> "The whole philosophy of the doctrine of *res judicata* is summed up in the simple statement that a matter once decided is finally decided; and all the learning that has been bestowed, and all the rules that have been laid down, have been for the purpose of enforcing that one proposition" (per Brewer, J., in Smith *vs.* Auld, 31 Kan., 262).

The doctrine was recently applied by this court in Nalle *vs.* Oyster, 38 Wash. L. Rep., 826, and in Lyon *vs.* Bursey, not yet reported.

The Wall is Not a Party Wall.

The wall stands on the *rear line of a sixteen-foot lot, already improved, on the far side of an alleyway, and has windows in it,* and could never be made use of by the plaintiffs.

A party wall must be susceptible of mutual use and benefit; otherwise it is no party wall.

Smoot *vs.* Heyl, 38 Wash. Law Rep., p. 218.
Corcoran *vs.* Naylor, 6 Mackey, 580.
Barber *vs.* Evans, 101 Mo., 665.
Field *vs.* Leiter, 118 Ill., p. 17.
Whitman *vs.* Shoemaker, 2 Pearson Penna., 320.
Moore *vs.* Shoemaker, 10 App. D. C., 14.
Leavison *vs.* Harris, 14 S. W., 343.
Hammann *vs.* Jordan, 13 N. Y. Suppl., 228.
Rector *vs.* Paterson, 63 N. J. L., 470.

The fact that the walls were not susceptible of mutual use was the turning point in the decisions of Smoot *vs.* Heyl and Corcoran *vs.* Naylor, *supra.* In Ravel *vs.* Mayer, Equity 28,101 (written opinion by Justice Barnard reviewing the authorities), the wall was held not a party wall because located on the back line of a lot.

> "In the absence of a special agreement or controlling custom to the contrary, it is an essential characteristic of a party wall that it should be capable of substantially similar use by each of the adjoining owners."
>
> 30 Cyc., 774, and cases cited note 7.

> "The term 'party wall' ordinarily means a wall built partly on the land of one and partly on the land of another *for the common benefit of both.*"
>
> Brown *vs.* Werner, 40 Md., 19.
> Odd Fellows Ass'n *vs.* Hegele, 24 Oregon, 16.
> Fettretch *vs.* Leamy, 9 Bosw. N. Y., 510.
> Barry *vs.* Edlavitch, 84 Md., 111.
> Simons *vs.* Shields, 72 Conn., 141.
> Hammann *vs.* Jordan, 9 N. Y. Suppl., 423.

The building regulation relating to party walls is unconstitutional and void.

Williams *vs.* Jewett, 139 Mass., 29.

The sanction of the Building Inspector cannot give validity to an unlawful act. Section 62 of the Building Regulations provides: "The Inspector of Buildings has no official duty as to the enforcement of this regulation, as the matter is one of private right between parties."

Sections 1003–1010 Code D. C. Not Applicable.

If the wall is not a party wall the defendants are trespassers.

> "The occupation meantime by what is not a party wall is not the enjoyment of an easement, but is simply a trespass."
>
> Corcoran *vs.* Naylor, 6 Mackey, 584.

These sections are merely enactments of the rules of the civil law giving innocent persons in possession under color of right the benefit of improvements *bona fide* made, and were never held to apply to trespassers.

Anderson *vs.* Reid, 14 App. D. C., 54.

> "Notice of an adverse claim deprives the occupant of any right to claim compensation for improvements" (Am. & Eng. Encyc. (2d. ed.), vol. 16, p. 87).

The record is sufficient notice.

Anderson *vs.* Reid, 14 App. D. C., 54.
Armstrong *vs.* Ashley, 22 App. D. C., 368.
Brown *vs.* Bedinger, 72 Tex., 248.

One who by mistake of law regards his title as good, cannot be allowed for improvements.

Williams *vs.* Jones, 43 W. Va., 562.
Holmes *vs.* McGee, 64 Miss., 129.

A wall not susceptible of joint use is not an improvement, but an incumbrance.

Leavison *vs.* Harris, 14 S. W. Rep., 343.

That a trespasser may erect a building on another's land and then make him pay for it, is novel doctrine.

See

Cautley *vs.* Morgan, *infra.*

Estoppel.

This question was in issue and was adjudicated in the previous case and the appellants are precluded.

See

Nalle *vs.* Oyster and Lyon *vs.* Bursey, *supra.*

If it were still open, there is no evidence justifying the application of the doctrine.

Brant *vs.* Virginia Coal & Iron Co., 93 U. S., 334.

Sturm *vs.* Baker, 150 U. S., 333.

There can be no estoppel where the title of the person against whom the estoppel is asserted is matter of record.

Frazee *vs.* Frazee, 79 Md., 30.

The opinion of the Supreme Court of Appeals of West Virginia, in Cautley *vs.* Morgan, 51 W. Va., 304, answers so many of the points made in the brief of counsel for the appellants that it is set forth here in full, by way of appendix.

APPENDIX.

"B. S. Morgan and J. H. Huling, being owners of a "twenty-two foot lot on Quarrie Street in the city of Charles- "ton, and Lucy R. Cautley, wife of R. K. Cautley, owning "an adjoining lot, and said Cautley being desirous of build- "ing a party wall between said lots for a business house on "her lot, on the 4th day of August, 1892, the parties entered "into a written agreement for the building by said Cautley "of such party wall of a three-story building then about to "be erected by said Cautley, by which agreement it was pro- "vided that said party wall should extend over for the en- "tire length of said wall ten inches upon the ground of "Morgan and Huling and as much further as might be "necessary for foundation purposes only, but the brick wall "should extend over upon the land of Morgan and Huling "only ten inches and it was provided that Morgan and Hul- "ing, their heirs, vendees and successors in ownership should "have the right to build, to use and join on and own one- "half of said party wall for any distance they might elect "upon the payment to Lucy R. Cautley, her heirs, vendees "or successors in ownership of the actual value at the time "and to the extent thereof, of so much of said party wall as "was built upon the lands of Morgan and Huling, and, in "case they should not agree upon the then value of such "party wall as should be upon their land and desired to be "used by them, that the value should be determined by "arbitration in the usual manner. In building said wall "Cautley, by mistake, built six inches further on the land of "Morgan and Huling than was provided for in the contract. "The wall was completed in the year 1893. In the fall of "1899 Morgan and Huling desiring to use the wall by put- "ting up a temporary building on their lot, discovered the "mistake made by Cautley in building too far on their land. "They notified Cautley of the fact and some correspondence "took place between the parties with reference to the adjust- "ment of the matter, but no agreement was reached and at "the May rules, 1901, Morgan and Huling brought in the "Circuit Court of Kanawha County their action of eject- "ment against Cautley to recover their said land.

"Lucy R. Cautley filed her bill in the Circuit Court of "Kanawha County praying for an injunction of said action

" of ejectment and from cutting away any part of said party
" wall, and that Morgan and Huling be decreed to pay plain-
" tiff for the use of said party wall according to the original
" agreement of August 4, 1892, and the subsequent agree-
" ment by correspondence made in the latter part of the year
" 1899, and to make such decrees and orders that might be
" necessary to effectuate justice between the parties, and for
" general relief. An injunction was accordingly granted
" plaintiff until the further order of the court. Defendants
" appeared and filed their demurrer and answer. The cause
" came on to be heard on the 15th of November, 1901, upon
" the bill, the demurrer and answer and replication thereto,
" and upon the defendants' motion to dissolve the injunc-
" tion. The court overruled the demurrer and refused to
" dissolve the injunction, from which decree the defendants
" appealed and for assignment say the court erred in over-
" ruling the demurrer to the bill and also in refusing to dis-
" solve the injunction upon the defendants' motion. There
" was no evidence taken in the cause and the same was heard
" solely on the pleadings, the bill and answer being sworn to.

" The title of the defendants to the lot in question is ad-
" mitted by plaintiff, who disclaims any interest therein ex-
" cept her interest in the wall built thereon. It will be seen by
" the agreement in writing that the brick wall should extend
" over upon the land of Morgan and Huling only ten inches.
" Plaintiff undertook, without any notice to the defendants,
" to locate said line which is claimed to have been done with
" the assistance of the city engineer, and built the wall on
" such location, and it is claimed and seems to be tacitly ad-
" mitted that the wall is built sixteen inches on the land of
" the defendants instead of ten inches as provided in the con-
" tract, and defendants claim that the wall is only sixteen
" inches wide instead of twenty inches as it was to have been
" as they claim under the contract. The bill does not allege
" that defendants had any actual knowledge of plaintiff's
" encroachment upon their lot prior to the time that they
" claim to have discovered it, in the fall of 1899 when they
" desired to use the wall in the construction of a temporary
" building. The bill does allege that the defendants ac-
" quiesced in the location, but not that they knew of such im-
" proper location. It appears from the bill that plaintiff
" undertook alone, and without invoking the assistance of
" the defendants, to make the location, and says she used

"every effort to get the location right. And defendants "aver in their answer that they had no knowledge of the "improper location until they undertook to use the wall in "November, 1899. It is not claimed by plaintiff in her bill "that defendants were called upon to take any part in the "location of the line nor given notice of her action in mak-"ing her measurements with the assistance of the engineer. "The bill alleges an agreement between the parties that the "defendants were to pay a sum of money for the use of the "wall while using it temporarily, which she prays may be "paid to her by the defendants, but this agreement is "denied by the answer of defendants, and the exhibits filed "with the bill and answer relating to such compensation do "not show an agreement to pay any particular sum. The "written agreement of August 4th does not specify in terms "how thick the wall should be, but it would seem to be un-"derstood that it was to be twenty inches, the same provid-"ing that it should be ten inches from the line on the land "of defendants the fair presumption is that the meaning "and understanding was that it should be ten inches on the "side of the plaintiff also from the line. If it was so built "and it has been, by mistake as alleged, placed six inches "too far on defendants' land then four inches of the wall "stands upon the land of the defendants. If the encroach-"ment is as claimed and the wall is only sixteen inches thick, "then the wall stands wholly on the land of the defendants. "In Blodgett *vs.* Perry, 97 Mo., 263, 10 Am. St. Rep., 307, "it is held to constitute an estoppel *in pais* 'there must be a "false representation or concealment of known material "facts, made to a party ignorant of their truth or falsity, "and made with intent that the latter party would act upon "them, and he must have so acted upon them.' And it is "there further held: 'Mere silence or some act done where "the means of knowledge are equally open to both parties "does not create an estoppel *in pais*.' And in Estis *vs.* Jackson, "111 N. C., 145; 32 Am. St. Rep., 784, it is held: 'To create "an estoppel *in pais* there must be some conduct of the party, "against whom the estoppel is alleged, amounting to a repre-"sentation or concealment of material facts, and when every-"thing is equally known to both parties, although they are "mistaken as to their legal rights, no estoppel arises.' Brant "*vs.* Coal & Iron Co., 93 U. S., 326; Liverpool Wharf *vs.* "Prescott, 7 Allen (Mass.), 494; 2 Her. on Estop., s. 1062;

" 2 Pom. Eq. Jur., s. 809; 11 A. & E. E. L., 421-432; Brewer
" *vs.* Railroad Co., 5 Metc., 478. In which last case A. and
" B. had a parol agreement on a line between them, which
" did not agree with the true line but they afterwards held
" possession by the agreed line. B. sold his land to C. Be-
" fore the sale A. stated to C. that he (A.) claimed by the
" agreed line between him and B. and did not claim beyond
" that line. C. purchased and made improvements on the
" land next to the agreed line with the knowledge of A., who
" was often present and pointed out said line expressing no
" dissent to C. proceeding or giving notice that he had any
" claim to said land. A. afterwards discovered that the
" agreed line was not the true line and that C. was in pos-
" session, as B. had been, of land which according to the
" true line belonged to A. He brought his action against C.
" to recover the land between the true line and the agreed
" line. It was held: 'That A. was not estopped to claim this
" land of C., as he had acted under a mere mistake without
" fraud or gross negligence.' In that case A. took an active
" part in fixing the line where it should not have been
" located. The case of Liverpool *vs.* Prescott, above cited, is
" very similar. These cases are both cited as leading cases in
" Bigelow on Estop. pages 618-19. At section 960, 2 Her-
" man on Estop. it is said: 'The principles which estop a man
" from claiming what is conceded to be his own property are
" highly penal in their character and should not be enforced
" unless there is a concurrence of circumstances, such as are
" necessary to the creation of equitable estoppel. Nor does it
" apply to one who has no knowledge of his rights.' In case
" at bar it is not pretended that defendants ever did any act,
" or made any admissions that were misleading, or upon
" which plaintiff could claim to rely, or that they knew of
" the encroachment except that they lived in the neighbor-
" hood of the property. Bartlett *vs.* Kauder, 97 Mo., 356-
" 361. And again in Rubber Co. *vs.* Rothery, 107 N. Y.,
" 310, it is held: 'Silence will not estop, unless there is not
" only a right but a duty to speak.' In Kirchner *vs.* Miller,
" 39 N. J. Eq., 355, a case almost on all fours with case at
" bar, where plaintiff and defendant were owners of adjoin-
" ing lots, plaintiff employed a surveyor to fix the dividing
" line which he mislocated, and plaintiff, supposing that he
" was building on his own land, inadvertantly placed his
" house a few inches over on defendant's lot, defendant also

" being then unaware of the encroachment. It was held:
" 'That equity would not enjoin an action of ejectment by
" defendant against complainant to recover possession of the
" strip so built upon.' It is true there is a contract in case at
" bar between the parties for a party wall, but there was a
" strict provision in the contract that plaintiff should not
" build more than ten inches on defendants' property, and
" going beyond that ten inch line was in fact as much a tres-
" pass as in the Kirchner-Miller case in going over the true
" line. It is claimed by appellee that said case is not applica-
" ble here, that in that case a cheap building was put upon
" the ground and could be removed at a small cost, and cites
" McKelway *vs.* Armour, 2 Stock. (N. J. Es.), 115, decided
" in 1854, in support of their contention. The position taken
" by the court in the McKelway case is criticized very severely
" in the case of Kirchner *vs.* Miller, cited, decided thirty
" years later. In the opinion in the last mentioned case be-
" ginning at page 358, the court says: 'Although in that case
" Armour saw McKelway building on his land, he did not
" know or suspect that the building was being erected on his
" land, but supposed it was being built on McKelway's land.
" The decision seems to have been based on the ground of
" mutual mistake. The court, in fact, compelled Armour,
" who was in nowise in the wrong, to sell his property to
" McKelway at a price to be fixed by the court, or to exchange
" properties with McKelway, or to pay for the improvements
" which McKelway had put on his, Armour's lot, although
" they had been so put on that lot, not only without Armour's
" knowledge, but without any suspicion on his part that Mc-
" Kelway was putting them on his, Armour's property. The
" principle of the case is that where one by mistake puts im-
" provements on another's land, mistaking it for his own,
" equity will, in a proper case, compel the latter to sell and
" convey the land to the former, at a price to be fixed by the
" court, unless he will consent to pay for the improvements.
" The exercise of such a judicial power, unless based upon
" some actual or implied culpability on the part of the party
" subjected to it, is a violation of constitutional right. No
" tribunal has the power to take private property for public
" use. The legislature itself cannot do it. In McKelway *vs.*
" Armour, the defendant was, by judicial compulsion, forced
" to sell his land to the complainant merely because the latter
" had, by his own mistake, put valuable improvements upon

"it, supposing it to be his own. The alternative given to "the defendant—the terms on which alone he was allowed "to hold his own property—was to pay for those improve- "ments.' And in the same opinion in discussing the case "then at bar it is said at page 360: 'The complainant's claim "is that inasmuch as he, misled by the mistake of the sur- "veyor, honestly but mistakenly assumed that he was the "owner of a strip of land which, in fact, belonged to the "defendant, and consequently built a part of his house on "it, he is, on that state of facts alone, although the defend- "ant neither did nor said anything to confirm him in his mis- "take, but in fact did not know that there was a mistake, en- "titled in equity to a decree that the defendant convey the "land to him at a price to be fixed by the court, or accept "land on the other side of his lot in exchange for it. To "state the claim is to demonstrate its untenable character.' "It will be seen that the rulings in the case of McKelway *vs.* "Armour were by no means approved. Appellee also cites "Acton *vs.* Dooley, 6 Mo. App., 323, where the opposite "doctrine is held from that in Kirchner *vs.* Miller, and "other cases cited, but it appears from the same case reported "in 74 Mo., 63, that an appeal was taken from said decision "and the decree reversed. In the opinion of the court last "mentioned in 74 Mo., reversing the St. Louis Court of Ap- "peals in Acton *vs.* Dooley, it is there said: 'Silence in "some cases will estop a party, but silence without knowledge "works no estoppel.' And in Frazee *vs.* Frazee, 79 Md., 27, "it is held: 'Where a party's rights in property sufficiently "appear of record, mere silence on his part is no violation of "duty and he is not estopped to assert his rights against per- "sons dealing with his property as another's.' 11 A. E. E. L., "435, and authorities there cited.

"Counsel for appellee charge defendants with the grossest "negligence in not measuring off the width of their lot to "ascertain the encroachment, that they saw the building "going up where it was and remained silent and by their "silence acquiesced in the location, when 'they could have "prevented the mistake by giving the matter ten minutes' "attention at the proper time.' The defendants were not "building the party wall, the proposition came from the "other side, they entered into the contract permitting it to "be built on the terms set out in the contract. The plaintiff "took it upon herself to fix the location and she had pre-

" cisely the same knowledge of the true line as the defend-
" ant. She proceeded to locate the line on her own responsi-
" bility giving the defendants no notice as to when and how
" she would ascertain the location, but fixed it herself and
" began and completed her building and now asks to have a
" court of equity relieve her from the results of a mistake
" purely and wholly her own. If the fact of a mistake could
" have been discovered by giving the matter ten minutes' at-
" tention at the proper time, it would seem that it was her
" duty to have given this attention; while there was no duty
" resting upon defendants in that behalf. Counsel for ap-
" pellee attempts to distinguish this case from Hodgkins *vs.*
" Farrington, 150 Mass., 19, and other cases cited by the de-
" fendant, because there was a contract for the erection of a
" party wall, but that contract itself fixes the line, beyond
" which she may not go on the defendant's property, at ten
" inches from the partition line and she is no more authorized
" to cross that line than she would be if building a wall on
" her own account, on her own land in crossing the division
" line. Counsel for appellee contend that this is a case *de*
" *minimus non curat lex*. The defendants have a narrow
" lot sufficient only for one business room and need every
" inch of their ground, and the mere value of the land per
" foot in that locality cannot be taken as a reasonable com-
" pensation for the damage done in taking the land. Every
" inch taken off of defendants' land reduces its value for
" practical purposes far beyond the mere valuation of the
" land, and being so located that they cannot supply the
" room by the purchase of other lands, to the extent of the
" inconvenience and reduction in the necessary size of the
" room and front entrance to the upper stories, the damages
" are irreparable; and the profits accruing to the other party
" in the enlargement of his room by changing the partition
" line are correspondingly great. This is a hard case, but it
" has been well said that 'hard cases make bad law.' This
" was well demonstrated in the case of McKelway *vs.* Armour,
" before cited, where a valuable dwelling-house was, by mis-
" take, built on the lot of another and the court undertook
" to relieve the party, who made the mistake by 'putting the
" defendant to as little inconvenience as possible,' by trans-
" ferring other property to him in the place of that taken,
" thus virtually making a new contract of sale and purchase
" for him; which case was afterwards, by the case of Kirch-

" ner *vs.* Miller, also cited, substantially overruled. The " court in its opinion criticising the decision in the McKel- " way case, says: 'The exercise of such a judicial power, un- " less based upon some actual or implied culpability on the " part of the party subjected to it, is a violation of constitu- " tional right. No tribunal has the right to take private " property for public use. The legislature itself cannot do " it.' In Pile *vs.* Pedrick, 167 Pa. St., 296, a case where " one party undertook to build a wall entirely upon his own " land was given by the city surveyor inaccurate lines, and " in constructing the wall encroached with his foundation " stones one and three-eighths inches on his neighbors' land, " without any encroachment by the wall above the surface, " and the neighbor refusing to permit the defendant to enter " upon his land so as to cut off the projecting ends of the " stones, the court held that in equity it was 'compelled to " enter a decree requiring the defendant to take down and " rebuild the entire wall from his own side.' This was cer- " tainly a hard case, but the court felt itself bound to main- " tain the constitutional rights of the individual in the en- " joyment and possession of his property. To have held " otherwise would have seemed right in that particular case " as the defendant could not have been damaged in any re- " gard, but it would have established a wrong principle, " therefore, the court felt bound to give the 'pound of flesh' " where it was demanded. It is not charged that either " party has been guilty of fraud or intentional wrong. Under " the circumstances of the case the defendants had no duty " in the matter, unless they had knowledge that the wall " was being constructed on an improper location, and it is " not alleged that they had such knowledge, and they aver " that they never discovered it until they came to use the " wall in the fall of 1899. While it was plainly the duty of " the plaintiff, having undertaken to build the wall and as- " suming the responsibility of fixing the location herself " with the assistance of the city engineer, it was manifestly " her duty to see that it was properly located. She had the " data at hand, by a careful use of the same, to have made " no mistake and with the facts before her and in her posses- " sion, or of record, the presumption was, and the defendants " had a right to believe, that plaintiff had located the line " at the proper place, and the defendants were not called " upon to make the investigation in order to save plaintiff

" from the mistake that proper care and watchfulness on her " part would have prevented. It seems to be one of those " cases where there was no intentional fault on the part of " either, but by the improper action, though unintentional, " of one of the parties a mistake was made, whereby one " party or the other must suffer a hardship. This being the " case it is held: That that party, upon whom a duty de- " volves and by whom the mistake was made, should suffer " the hardship rather than he who had no duty to perform " and was no party to the mistake. For the reasons here " given the decree of the Circuit Court, in refusing to dis- " solve the injunction, is reversed and the court, proceeding " to render such decree as the Circuit Court should have ren- " dered, dissolves the injunction and dismisses the bill with " costs."

Respectfully submitted.

EUGENE A. JONES,
CHARLES F. CARUSI,
Attorneys for Appellees.

IN THE

Court of Appeals, District of Columbia

No. 2241.

DORA F. ROBINSON, ET AL., *Appellants,*

vs.

MYRA T. HILLMAN, ET AL.

REPLY BRIEF FOR APPELLANTS.

1. At pages 1, 2, 3, 5, 6 and 9 of the brief of counsel for the appellees they assert, and ask the Court to consider, matters not pleaded or proven and wholly outside the record in this case, but said to be found in the record in No. 2202 in this Court between the same parties who are parties to this case. Without assenting to this unconventional proceeding, but desiring that the Court shall be fully informed as to the matters so asserted, counsel for the appellants submit the following:

2. At pages 2, 3, 6 and 9, counsel for the appellees assert, as matter of estoppel, that in the other case, said No. 2202,

this Court affirmed a judgment against these appellants, but they ignore the fact that when their brief containing such assertion was filed this Court had under consideration a motion for rehearing in that case.

3. At page 3, referring to the other case as well as to this case, they state that "the verdicts of two juries" were against these appellants, but they fail to mention the fact that in this case the Court took the case from the jury.

4. At pages 1 and 2 they assert that in the other case it appeared that these appellants had entered upon the property of the appellees and established thereon a way in favor of the appellants and others. The record in the other case shows (p. 18) that said way was established, not in favor of the appellants, but in favor of the appellees, and with their implied concurrence.

5. At page 2 they erroneously state that the width of the strip involved in this suit is 4 feet, 9 inches, plus 9 inches covered by the west half of the wall, which would make the width of the *locus in quo* 5 feet, 6 inches. The width is stated in the declaration (Rec., 2) to be 4.81 feet.

6. At page 3 they erroneously state that in the other case these appellants raised the same questions which they raise in this case as to the appellees' lack of title. That misstatement seems incapable of explanation. In the other case there was absolutely no question raised as to the title to the strip of land involved in this suit, and that question was not involved in that suit.

7. At page 6 they state that the wall has windows in it. That statement is unpardonable. Such windows are not mentioned in the record in this case or in the other case.

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GEO. A. PREVOST,
JNO. RIDOUT,
Attorneys for Appellants.

Court of Appeals, District of Columbia.

JANUARY TERM, 1911.

No. 2241.

DORA F. ROBINSON, C. BARNWELL ROBINSON,
APPELLANTS,

vs.

MYRA T. HILLMAN, ELIZABETH CLEMENT,
APPELLEES.

PETITION FOR RE-ARGUMENT AND BRIEF IN SUPPORT.

EUGENE A. JONES,
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PETITION FOR RE-ARGUMENT AND BRIEF IN SUPPORT.

Come now the appellees by their attorneys, Eugene A. Jones and Charles F. Carusi, and move the court to grant a re-argument of the above-entitled cause on the grounds set forth in the annexed brief.

EUGENE A. JONES,
CHARLES F. CARUSI,
Attorneys for Appellees.

BRIEF.

The decision handed down in this case is of a practical and far-reaching importance, many times greater than is involved in the mere decision of this particular controversy affecting numerous other interests not represented here. In a city like Washington, where building goes on constantly, there can hardly be conceived a matter of greater importance than is involved in the answer to the question, "What is a party wall?"

By its decision in this case the court in effect announces that that question is one which no lawyer or title company or builder can decide in advance of building, but which must in each case be left to be passed on by a jury after the wall is built and a controversy arisen. In other words, what is or is not a party wall is no longer to be a question of law upon which attorneys can advise their clients or upon which, as in the present case, the trial justice can pass upon the undisputed facts of the case, but is one which must depend upon the decision of a particular jury as to whether or not in its opinion a particular wall will or will not, to quote the opinion, "satisfy the reason or purpose for which the regulation was devised." Thus we will have the situation that one jury decides that a wall on the rear line of a 100-foot lot improved by a three-story brick dwelling occupying the front 50 feet of said lot is a party wall, and the very next jury that passes upon the same question may decide that such wall is not a party wall. Of course, it is conceded that if there were any disputed facts the defendant would have the right to have the jury pass upon the facts, and their verdict would include the application to the facts of the principles of law governing, which would have been given to them by the trial judge in his charge. In the present case, however, there is no question of fact to be passed upon by the jury

unless the question as to what constitutes a party wall is a question of fact. It is further submitted that the future growth of the city and probable changes in the uses of property can have no legal bearing upon the question as to whether the present wall is or is not a party wall. In case the wall erected was on the side line of vacant ground, the right opportunity to utilize it arises immediately upon its erection, but where the opportunity to utilize the party wall depends upon the future growth of the city and more or less probable or improbable changes in the uses of property, it is respectfully submitted as a proposition of law for the consideration of this court, that such a wall does not as a matter of law satisfy the reason and purpose for which the party-wall regulation was devised. If in addition to speculating as to whether a party wall will, at the time it is erected, "satisfy the reason and purpose for which the regulation was devised," juries are to be allowed to speculate as to whether such a wall may not in the future, when the uses of property have entirely changed on account of the growth of the city, satisfy the reason and purpose of the regulation, then, as has before been stated, no man can build a party wall with any feeling of security as to his right to do so. Future changes in the city may make that a party wall which at the time of its erection is not a party wall, or, conversely. what is a party wall at the time of its erection may ten years afterwards become a nuisance.

Again, the court in this case apparently lays down the rule that the burden is upon the plaintiff in ejectment to introduce evidence to show that an alleged nuisance upon his property cannot be availed of as a party wall, whilst the general rule is that where one seeks to justify a trespass upon another's land the burden is upon *him* to prove the facts which constitute a license for what would otherwise be a trespass. *The court below held that the defendants were the proponents of the proposition that the wall was a party wall, and that it was their duty to show its mutually beneficial*

character, and we submit this was right. (See section 2487*a* Wigmore's Evidence.) And even if this statement in this court's opinion should be construed by the trial justice to mean that the defendants should be given another opportunity to introduce evidence that the wall in question can at present be availed of as a party wall, that fact, we respectfully submit, is not decisive of the question. A man can always utilize a wall built upon his ground, whether it is a party wall or not. The question is not his right to use it, but the other man's right to build it on his land without his permission. It should be remembered that the party-wall regulation is in derogation of the common law, and even assuming that its constitutionality is well settled in this jurisdiction, nevertheless, a regulation which allows one citizen to take and use the property of another citizen without making him any compensation for it, while it may still be justified within certain well-defined limits made necessary by modern conditions of improving real estate, cannot be stretched to a point where, in place of obvious benefit to the property encroached upon, is substituted the fact that the wall may in future be utilized. If the scope to which such a building regulation may be extended by the courts is to be left to the caprice and speculation of each different jury that may have to pass upon such question, the constitutionality of the regulation must be re-argued. The trial justice was convinced that this wall was beyond and outside of the reason and purpose for which the party-wall regulation could be sustained. It may be that this court is of a different mind, but it is respectfully submitted that it would be a calamity to the property-holders of this jurisdiction if the entire matter were to be left unsettled and thrown open to be speculated upon by different juries.

The opinion of this court bases the reversal on the ground that no evidence was introduced by the plaintiffs to show that the wall could not be used as a party wall. The opinion at page five states, "The wall seems to have been constructed

in accordance with the regulations looking to stability, safety, etc., and there is no evidence to show that it cannot be availed of as a party wall, should plaintiffs hereafter desire to make use of it as such." Again on the same page and preceding the foregoing language, the opinion states, "It is settled that every wall that may be constructed by the adjoining owner in serving his own ends, is not necessarily a party wall within the meaning of the regulations. It must be such a wall as will satisfy the reason and purpose for which the regulation was devised. Smoot *vs.* Heyl, 38 W. L. R., 218." Disregarding for the purpose of this argument the testimony of the plaintiffs as to the location of the wall on the far side of an alley-way, the use of which is necessary to their enjoyment of the property—and that their property is already improved in a permanent way by a three-story brick structure, already accommodated with sufficient party walls, we earnestly and respectfully submit that the effect of the decision is to cast upon the plaintiffs in case of a new trial the duty of proving a fact that the law requires the defendants to prove. The question of party wall *vel non* is a *defense.* The defendant must prove that this obstruction on the plaintiff's property *is a party wall.* There is no presumption that a wall placed upon the dividing line between two properties is a party wall (Pile *vs.* Pedrick, 167 Penna. St., 296; Hammam *vs.* Jordan, 9 N. Y. Supp., 423; such a presumption would arise out of a joint use—Kelly *vs.* Taylor, 43 La. Ann., 1157), but he who affirms it is, must prove it by a preponderance of the evidence, and if at a trial of such an issue the party upon whom the burden of proving that it *is* a party wall fails to adduce sufficient evidence to show it *is* a party wall, he fails to make out his defense. The plaintiff is not required to prove that the wall is not a party wall, and if from all the evidence in the case, that evidence being undisputed, the court is unable to say whether the wall is or is not a party wall (and that is the situation here as we interpret the opinion), the judgment must be against him who has the affirmative of the issue.

Had there been any contradictory evidence as to the physical character of the wall, its location, the location and character of the improvements already on the plaintiffs' land, it would then have been proper for the court to have submitted the facts to a jury for its decision, but where the facts are undisputed and the only question is as to the interpretation and application of the regulation in question to the undisputed facts in the case, the question is one for the court. At the close of the plaintiffs' case they had shown a good title to the land in controversy, and the defendants stood in the position of trespassers; it therefore became necessary for *them* to go forward with the evidence and show facts justifying their trespass; they attempted to meet this burden by showing a wall on the dividing line between the properties, but they failed to offer any evidence to show that the alleged party wall stood at once ready for the enjoyment of the plaintiffs and so failed to make out their defense. Indeed the defendants could not honestly contend that the wall they built was intended by them for the joint accommodation of both parties, for at the very time they were building it they were claiming that the four-foot strip separating the plaintiffs' wood-sheds from the wall was an alley-way for the use and benefit of both owners, and any attempt by the plaintiffs to use the wall, were it practicable to use it at all, would have been resisted by the defendants as an obstruction of their right of way. This contention as to the character of the four feet was disposed of in No. 2202 adversely to the defendants, but it shows conclusively that the defendants never entertained the idea that the wall would or could be used by the plaintiffs, but blundered ahead in blind reliance on the opinion of the surveyor who laid off the foundations.

The essential characteristic of a party wall is its *immediate* availability for joint use—not, we respectfully submit, that it may at some time in the future, under conditions which may never exist, become available, but its present susceptibility of joint use. In other words, it is a party wall at the time it is built, or not at all, and this court has so held in

Corcoran *vs.* Naylor and Smoot *vs.* Heyl, cited in plaintiffs' brief. In Corcoran *vs.* Naylor, a wall having windows in it, but otherwise complying with the regulations, was claimed to be a party wall, the builder thereof admitting that while it could not *then* be used by the adjoining owner as a party wall, yet whenever the adjoining owner wanted to use the wall he could close up the windows and make use of it. The court held it was no party wall—that a party wall must stand *at once* ready for the use of the adjoining owner. The following language (italics ours) from that case was quoted with approval in Smoot *vs.* Heyl, 38 W. L. R., p. 218: "The servient owner is compelled to submit to the burden only on the ground that the thing imposed is, in contemplation of law, a benefit equally to him and to the dominant owner; *in other words that it at once stands ready for his enjoyment for all the purposes for which a party wall is intended to serve.*" For other authorities to the same effect we refer to the brief used at the argument.

At page five of the opinion in this case the court uses the following language, "if the wall answer the ordinary requirements of a party wall, the right to erect it in part upon the adjoining lot cannot be made to depend upon the intention or ability of the owner of the lot encroached upon to make use of it at the same time." We respectfully submit that all the authorities hold the ordinary requirements of a party wall to be its *immediate availability* for joint use, but agree that it does not depend upon any present *intention* on the part of the adjoining owner to make use of it. **There is no case in the books holding that a back line of a lot can be made use of for a party wall; and if it may, then any line of a lot may be treated as such; and so an owner of an octagonal lot would be subjected to encroachment from seven different sides without any possibility of mutual benefit; party-wall regulations never were intended to apply to any but side lines, and as an economy in frontages of mutual benefit to both owners.**

It is difficult to conceive, we respectfully submit, how a lot with a frontage on a public street of only sixteen feet, and a depth of one hundred feet, could ever be utilized so as to make a wall built across the rear nine inches available as a party wall, even if the lot were unimproved, and surely, where the lot is already permanently improved, a jury shall not be permitted to say that such a wall is a mutual benefit to both owners.

We earnestly hope the court will re-examine the cases cited on pages six and seven in the brief used at the argument, with a special reference to the point that a party wall must be *presently* available for joint use, rather than possibility of future joint use.

Respectfully submitted,

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